

Boston College Law Review

Volume 50

Issue 5 *Publicity, Privacy, and Intellectual Property*
Meet the First Amendment


Article 3

11-1-2009

A Perspective on Human Dignity, the First Amendment, and the Right of Publicity

Roberta Rosenthal Kwall
rkwall@depaul.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [First Amendment Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C.L. Rev. 1345 (2009), <http://lawdigitalcommons.bc.edu/bclr/vol50/iss5/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

A PERSPECTIVE ON HUMAN DIGNITY, THE FIRST AMENDMENT, AND THE RIGHT OF PUBLICITY

ROBERTA ROSENTHAL KWALL*

Abstract: The right of publicity is a legal theory that enables individuals to protect themselves from unauthorized, commercial appropriations of their personas. Allowing the unauthorized use of an individual's persona potentially poses the maximum harm when the persona is being appropriated in an objectionable context or for an objectionable purpose. In these instances, neither an award of injunctive relief nor monetary damages will erase the damage to the persona. These are situations involving dignity, as opposed to economic, harms. Much ink has been spilled over the intersection between the right of publicity and the First Amendment generally. To date, however, neither courts nor commentators have focused specifically on how the existence of dignity harms should impact the analysis in these cases. This Article attempts to open a dialogue on this point.

INTRODUCTION

The right of publicity is a legal theory that enables individuals to protect themselves from unauthorized, commercial appropriations of their personas. Although the right of privacy and the right of publicity are similar in that both doctrines are aimed at controlling the extent to which one party can use the details of the life of another, they nonetheless have come to represent distinct legal theories. Publicity actions typically are regarded as the means to achieve compensation for the loss of financial gain due to a defendant's unauthorized appropriation. In contrast, the right of privacy continues to be regarded as the predi-

* © 2009, Roberta Rosenthal Kwall, Raymond P. Niro Professor of Intellectual Property Law, Founding Director, DePaul College of Law Center for Intellectual Property Law and Information Technology. I wish to thank Fred Yen and the organizers and participants of the Boston College Law School symposia for helpful feedback, and Glen Weissenberger, former dean of DePaul University College of Law, for generosity with research support. I also extend thanks and appreciation to my student Aaron White for excellent research assistance. This Article is dedicated to my dear friend, Jim Jacobson (DePaul Law, Class of '81) who passed away as the piece was going to press. Jim lived his life with the utmost "dignity" and taught all of his friends and family that "every day is a lucky day."

cate for actions based on hurt feelings.¹ This distinction is the result of fact patterns in seminal cases as well as the legal system's failure to embrace a cohesive legal doctrine that affords individuals the ability to redress unauthorized appropriations of their identities involving both economic and reputational damage.

Allowing the unauthorized use of an individual's persona potentially threatens maximum harm when the persona is being appropriated in an objectionable context or for an objectionable purpose. In these instances, neither an award of injunctive relief nor monetary damages will erase the harm to human dignity already inflicted by the user's unauthorized appropriation. No judicially mandated relief can eliminate the effects of this objectionable use of the persona. Such situations involve dignity, as opposed to economic, harms.

The reality is that many actions based on the unauthorized use of personas involve both dignity and economic harms. For example, in the 1992 case, *Waits v. Frito-Lay, Inc.*, singer Tom Waits sued Frito-Lay and its advertising agency for using a sound-alike who imitated Waits' distinctive voice in a commercial for Doritos.² Waits has a firm policy against doing commercials because he believes that commercials undermine the artistic integrity of musicians.³ The U.S. Court of Appeals for the Ninth Circuit affirmed the propriety of a hefty damage award and specifically noted that a violation of a plaintiff's right of publicity can induce humiliation and embarrassment.⁴ Similarly, in the 1990 case *Tin Pan Apple, Inc. v. Miller Brewing Co.*, decided by the U.S. District Court for the Southern District of New York, the plaintiff singing group, the "Fat Boys," prevailed against the defendant's motion to dismiss with respect to various claims, including violations of the right of publicity based on the defendant's use of a look-alike group in a commercial for beer after the plaintiffs had declined to appear in the commercial.⁵ The singing group fostered a wholesome image, encour-

¹ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995); *id.* § 49 cmt. b; see also Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 285 n.257 (2005); *cf.* RESTATEMENT (SECOND) OF TORTS §§ 652C, 652H (1977) (providing that the measure of damages for an invasion of privacy is the harm to the plaintiff's privacy resulting from the invasion, the mental distress proved, and special damages resulting from the invasion).

² 978 F.2d 1093, 1096 (9th Cir. 1992).

³ *Id.* at 1097.

⁴ *Id.* at 1103-06.

⁵ 737 F. Supp. 826, 828, 836-37 (S.D.N.Y. 1990).

aging youth to stay in school and avoid all use of alcohol and illegal substances.⁶

Moreover, in the age of “reality television” the line between celebrity and non-celebrity has become especially fuzzy. Today more than ever before, ordinary people have the opportunity to garner their so-called “fifteen minutes” of fame.⁷ Although these individuals may benefit from this exposure, one downside is that “short-term” celebrities are more likely to be the subject of right-of-publicity violations generally and dignity harms in particular, as compared to people lacking any celebrity status.

Much ink has been spilled over the intersection between the right of publicity and the First Amendment.⁸ To date, however, neither courts nor commentators have focused specifically on how the existence of dignity harms should impact the analysis in these cases, and so this Article attempts to open a dialogue on this point. For purposes of this work, I accept the right of publicity’s existence as a given, and therefore do not argue for or against the right. Instead, I propose a way of thinking about those publicity cases where damage to human dignity is a prime—or even the prime—concern of the plaintiff.

Part I of this Article examines the relationship between causes of action such as privacy, defamation, and the right of publicity that can involve harm to a plaintiff’s dignity.⁹ It then explores how conflict can arise in connection with these types of claims and the First Amendment.¹⁰ Part II discusses the current tests courts have used to determine

⁶ *Id.* at 828.

⁷ This reference is derived from Andy Warhol’s famous quip: “In the future everybody will be world famous for fifteen minutes.” THE OXFORD DICTIONARY OF QUOTATIONS 803 (Elizabeth Knowles ed., 5th ed. 1999); see also Gloria Franke, Note, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 989 (2006) (noting how the Internet and reality programming have fostered “the democratization of celebrity”).

⁸ See, e.g., Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 TORT & INS. L.J. 635 (1995); F. Jay Dougherty, *All the World’s Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1 (2003); Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47 (1994); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003); Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL-LCA J. ART & ENT. L. 283 (2000); Diane Leenheer Zimmerman, *Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. REV. 1503 (2009).

⁹ See *infra* notes 13–43 and accompanying text.

¹⁰ See *infra* notes 44–58 and accompanying text.

how the right of publicity specifically should co-exist with the First Amendment, and concludes that none of these tests are suitable in the context of publicity claims involving dignity harms.¹¹ Part III develops a more suitable framework for evaluating such claims.¹²

I. DIGNITY HARMS, THE RIGHT OF PUBLICITY, AND THE FIRST AMENDMENT

More than forty years ago, Edward Bloustein emphasized the importance of dignity in his classic explanation of the inviolate personality that “defines man’s essence as a unique and self-determining being.”¹³ In his work, Bloustein argued that the four distinct invasions of the right of privacy described by Dean Prosser¹⁴ all share a concern with safeguarding human dignity.¹⁵ In discussing one of these strands, which would become known as the right of publicity, Bloustein posited that commercial uses of a person’s name or photograph are actionable because of the injury caused “to the sense of personal dignity” by diminishing that individual’s freedom.¹⁶ This invasion amounts to “a wrongful exercise of dominion over another” even if the use was “subjectively appreciated” or profitable.¹⁷ Similarly, Bloustein saw “false light” privacy invasions as impairing a person’s freedom to maintain her individual identity.¹⁸ He observed that “[p]ublishing a photograph in a ‘false light’ serves the same function in constituting the wrong as does a use of the photograph for advertising purposes.”¹⁹ Bloustein also noted a

¹¹ See *infra* notes 59–119 and accompanying text.

¹² See *infra* notes 120–149 and accompanying text.

¹³ Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964) (defining key components of the inviolate personality as “the individual’s independence, dignity and integrity”). According to Daniel Solove, Bloustein’s conception of privacy is grounded in personhood and individuality. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1116 (2002) (critiquing numerous traditional conceptions of privacy and proposing that privacy be conceptualized in situation specific terms).

¹⁴ These strands are: 1) Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; 2) Public disclosure of embarrassing private facts about the plaintiff; 3) Publicity which places the plaintiff in a false light in the public eye; 4) Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

¹⁵ Bloustein, *supra* note 13, at 974.

¹⁶ *Id.* at 988 (noting that such uses turn individuals into commodities and make them serve the economic interests of others).

¹⁷ *Id.* at 990.

¹⁸ *Id.* at 991–93.

¹⁹ *Id.* at 992. Bloustein also expressly noted that many of the false light cases also involved the use of a person’s identity for commercial purposes. *Id.*

trend in defamation law to include protection against “aspects of personal humiliation and degradation.”²⁰ The significance of Bloustein’s analysis for purposes of this Article is his recognition of the dignity interests inherent in privacy, defamation and publicity actions.

The case law contemporaneous with and subsequent to Bloustein’s article supports his position that privacy, defamation, and publicity actions contain inherent dignity interests. Nevertheless, the growth and often-overlapping nature of these legal doctrines have sometimes obscured these dignity interests, especially with regard to the right of publicity. This failure to recognize dignity interests in the right of publicity has important repercussions when publicity interests conflict with First Amendment rights.

A. *Dignity Interests in Defamation and Privacy Law*

Privacy and defamation law explicitly recognize dignity interests. In the 1964 case *New York Times Co. v. Sullivan*, which was decided the same year the Bloustein article was published, the U.S. Supreme Court held that damages for defamation could not be sustained by politicians absent a showing that the remarks at issue were false and defamatory and made with “actual malice,” meaning with knowledge of their falsity or with reckless disregard for the truth.²¹ Three years later, in *Time, Inc. v. Hill*, the Court invoked the same “actual malice” standard in an action for damages under New York’s right of privacy statute.²² *Hill* involved a claim brought by a private person against Life Magazine for falsely reporting that a particular play accurately portrayed the experience suffered by the plaintiff and his family when they were held hostage by escaped convicts.²³ In a footnote relevant to the focus of this Article, the Court compared “the interest protected in those ‘privacy’ cases which focus upon the falsity of the matter to that protected in cases of libel and slander—injury to the reputation.”²⁴ The *Hill* Court further noted that many privacy cases could have been brought as “libel per quod” actions.²⁵

²⁰ *Id.* at 993.

²¹ 376 U.S. 254, 279–80 (1964).

²² 385 U.S. 374, 387 (1967).

²³ *Id.* at 376–78.

²⁴ *Id.* at 385 n.9.

²⁵ *Id.* (noting also that “all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation” whereas privacy cases typically concern mental distress, “although injury to reputation may be an element bearing on such damage”). Subsequently, the Supreme Court held that the actual malice standard is

The line between privacy and defamation is indeed fuzzy. As Bloustein observed, “[t]he slur on reputation is an aspect of the violation of individual integrity.”²⁶ Thus, defamation cases may also trigger “assault[s] on individual personality and dignity” characteristic of privacy violations.²⁷ With respect to the right of publicity, however, these dignity interests have not been as readily recognized.

B. *Dignity Interests and the Development of the Right of Publicity*

No clear line of demarcation exists between privacy and publicity. In the landmark 1905 decision, *Pavesich v. New England Life Insurance Co.*, the Supreme Court of Georgia upheld the plaintiff’s invasion of privacy claim against an insurance company that had utilized the plaintiff’s picture, without his consent, in an advertisement for insurance.²⁸ The court observed that because the “form and features of the plaintiff are his own,” the defendant invaded “the rights of his person” by displaying them in public for advertising purposes.²⁹ The court’s decision was an early precursor to the right of publicity.

Subsequent decisions in invasion of privacy suits explicitly recognized an individual’s proprietary interest in her name and likeness.³⁰ Most of the plaintiffs in these early cases were private individuals seeking compensation for injuries to their feelings caused by defendants’ appropriation of their likenesses. Instead of recognizing dignity harms, however, these courts were compelled to focus on the property interests in names and likenesses to counter the defendants’ arguments that the law does not afford relief for invasion of privacy unless such an intrusion is accompanied by injury to, or interference with, a person’s prop-

applicable to actions by public figures and officials based on intentional infliction of emotional distress when the publication at issue could not reasonably be interpreted as stating actual facts about the subject involved. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988).

²⁶ Bloustein, *supra* note 13, at 991.

²⁷ *See id.*

²⁸ 50 S.E. 68, 68–69, 81 (Ga. 1905).

²⁹ *Id.* at 79; *cf.* Bloustein, *supra* note 13, at 985 (noting that in *Pavesich*, “[t]here was no suggestion . . . that the plaintiff sought to vindicate a proprietary interest, that he sought recompense for the commercial value of the use of his name”).

³⁰ *See, e.g.,* *Munden v. Harris*, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911) (holding that an individual has a property right in his picture); *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907) (“[I]t is difficult to understand why the peculiar cast of one’s features is not also one’s property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it.”).

erty.³¹ These privacy decisions thus supported the proposition that those wishing to capitalize upon another's name or likeness for advertising purposes should not be free to do so without compensating the principal. These cases also reveal a connection between hurt feelings and monetary relief, but the opinions themselves were framed in terms of property-based law.

The right of publicity as a legal theory distinct from privacy was first explicitly recognized in 1953. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the U.S. Court of Appeals for the Second Circuit declared that an individual has, independent of the right of privacy, a right in the publicity value of her photograph.³² The photographs at issue in *Haelan* depicted baseball players, individuals with obvious celebrity status.³³

The development of a separate right of publicity was significant because it thwarted the tendency to construe an individual's celebrity status as a waiver of the right of privacy.³⁴ For example, in the 1941 case, *O'Brien v. Pabst Sales Co.*, the U.S. Court of Appeals for the Fifth Circuit denied recovery to a renowned football player for invasion of his privacy when the defendant company published his picture, without consent, in the 1939 Pabst Football Calendar.³⁵ The court predicated its holding, in part, on the plaintiff's status as a public personality who constantly sought publicity in other contexts.³⁶ Absent from the court's

³¹ See, e.g., *Munden*, 134 S.W. at 1077; *Edison*, 67 A. at 394–95. Recognition of the property right inherent in names and likenesses prompted these courts to recognize further that any value inherent in an individual's likeness belongs exclusively to that individual. See, e.g., *Munden*, 134 S.W. at 1079; *Edison*, 67 A. at 394–95.

³² 202 F.2d 866, 868 (2d Cir. 1953). For discussions of some pre-*Haelan* decisions that implicitly recognize a right of publicity, see Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 560–65 (1960); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 218–21 (1954).

³³ See *Haelan*, 202 F.2d at 867.

³⁴ See Nimmer, *supra* note 32, at 204–10. At least one court observed explicitly that a private citizen can rely upon the right of privacy to prevent the appropriation of her photograph for commercial purposes, whereas a public figure or celebrity has a “similar” right of publicity. *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982). This distinction, however, is not necessarily the norm because celebrities, like other people, can recover for mental distress resulting from the unauthorized commercial use of their identities. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995); see also *supra* notes 2–6 and accompanying text. In addition, private citizens have prevailed under the right of publicity for commercial misappropriations. See, e.g., *Fanelle v. LoJack Corp.*, No. CIV.A. 99-4292, 2000 WL 1801270, at *10 (E.D. Pa. Dec. 7, 2000) (noting that the majority view is that non-celebrities can bring a cause of action based on the right of publicity).

³⁵ 124 F.2d 167, 168–70 (5th Cir. 1941).

³⁶ *Id.* at 168–69.

rationale, however, was a recognition of the possibility that the plaintiff might have experienced an assault to his dignity by virtue of the defendant's particular use of his identity.³⁷ Had early decisions such as *O'Brien* sufficiently appreciated the dignity interests at stake in privacy cases involving unauthorized commercial appropriations of celebrities' personas, the case law might have taken a completely different course.³⁸

Significantly, right of publicity case law reveals a marked lack of appreciation for the relevance of assaults to a plaintiff's dignity. This tendency is problematic. On a conceptual level, identity is a concept completely intrinsic to the individual to whom it is attached and therefore properly subject to that individual's control.³⁹ Private individuals, no less than celebrities, manifest associational choices reflecting their character and values, choices that can be viewed as "the text" of their

³⁷ See McKenna, *supra* note 1, at 243.

³⁸ Cf. Bloustein, *supra* note 13, at 989 ("[T]here is really no 'right to publicity'; there is only a right, under some circumstances, to command a commercial price for abandoning privacy.").

From the outset, confusion surrounded the application of the right of privacy and the right of publicity, particularly in instances in which celebrities were suing for only invasion of privacy and non-celebrities were seeking compensation for the appropriation of their identities. This confusion regarding the applicability of privacy and publicity is compounded by the reality that in several states, such as New York, Nebraska, Virginia, and Wisconsin, privacy statutes make actionable the unauthorized appropriation of personas for all individuals. Moreover, state statutes typically are sufficiently broad to incorporate both commercial and personal interests. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995). The U.S. District Court for the Southern District of New York, the home of many such lawsuits, specifically held that the right of publicity is subsumed in the state statutory right of privacy. See *Ryan v. Volpone Stamp Co.*, 107 F. Supp. 2d 369, 391 (S.D.N.Y. 2000) (interpreting N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2006)).

If the line blurs between privacy and defamation, on the one hand, and between privacy and publicity, on the other, it should not come as a surprise that the line between publicity and defamation also is fuzzy. David Welkowitz and Tyler Ochoa have invoked the term "stealth defamation" to describe those actions in which plaintiffs invoke the right of publicity to sidestep the constitutional limitations on defamation claims. See David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA L. REV. 651, 652–55 (2005). According to conventional wisdom, publicity cases involve a property interest, unlike defamation cases. See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968 (10th Cir. 1996). Still, courts have granted injunctions in defamation cases involving patent infringement and other matters when they perceive the existence of a property interest at stake. See Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 653, 724–26 (2008) (discussing post-Reconstruction era defamation cases involving patent disputes, labor boycotts, and strikes where a property interest was recognized and relied on as a basis for injunctive relief).

³⁹ See Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 431 (1999).

identities.⁴⁰ Mark McKenna has termed this interest one of “autonomous self-definition” and argues that “every individual should be able to control uses of her identity that interfere with her ability to define her own public character.”⁴¹ According to this perspective, an individual’s persona requires protection, not just from economic encroachment, but also from damage to the human spirit as a result of unauthorized uses of the persona deemed objectionable on moral grounds. The interest served in many privacy, publicity, and even defamation cases embodies a “spiritual” quality rather than an interest in property or even reputation.⁴² There is value to acknowledging the “conceptual unity” of these cases.⁴³

C. *Right of Publicity and the First Amendment*

The absence of an express consideration of damage to human dignity muddies the analysis in cases where the right of publicity is alleged to conflict with the First Amendment. Consider comedian Jackie Mason’s suit against Jews for Jesus.⁴⁴ Mason sued the group based on the use of his name, likeness, and act in a pamphlet featuring a caricature of Mason on the front and a riff on one of his routines inside.⁴⁵ Mason is an ordained rabbi and a founding member of Jews Against Anti-Christian Defamation.⁴⁶ He once rode down Fifth Avenue in New York with a banner proclaiming “Jews for ‘It’s OK To Say Merry Christmas,’” but he is not a Jew for Jesus.⁴⁷ He claimed that the group’s use of his attributes and personality to attract attention and converts had damaged him to an “incalculable degree.”⁴⁸ Mason brought the suit under New York’s privacy statute, which requires that the use be

⁴⁰ See McKenna, *supra* note 1, at 229.

⁴¹ *Id.* at 285.

⁴² See Bloustein, *supra* note 13, at 1002.

⁴³ See *id.* at 1004 (“Conceptual unity [of the law] is not only fulfilling in itself, however; it is also an instrument of legal development.”).

⁴⁴ *Mason v. Jews for Jesus*, No. 06 Civ. 6433(RMB), 2006 WL 3230279, at *1 (S.D.N.Y. Nov. 8, 2006); see also ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (forthcoming 2010).

⁴⁵ *Id.*

⁴⁶ See Anemona Hartocollis, *To Settle Suit, Jews for Jesus Apologizes to Jackie Mason*, N.Y. TIMES, Dec. 5, 2006, at B2; Press Release, Jews Against Anti-Christian Defamation, Jackie Mason Will Say “Merry Christmas” on 5th Avenue (Dec. 15, 2005) (*available at* <http://www.jews4fairness.org/pr121405.php>).

⁴⁷ See Hartocollis, *supra* note 46; Press Release, Jews Against Anti-Christian Defamation, *supra* note 46.

⁴⁸ Darch Gregorian, *Jackie: “Jesus” Heist!—Comic Sues over Ad*, N.Y. POST, Aug. 25, 2006, at 19; see also *Mason*, 2006 WL 3230279, at *2 n.2.

“for advertising or for trade” in order to be actionable.⁴⁹ The court denied his motion for a preliminary injunction.⁵⁰

Similarly, in *Nussenzweig v. DiCorcia*, a 2006 New York Supreme Court decision, the defendant, a well-known professional photographer, took a series of candid photographs in Times Square without the permission of his subjects, which he compiled into a particular collection.⁵¹ One of the photographs he used was of the plaintiff, a Hasidic Jew who believes that the defendant’s use of his image violates the Second Commandment’s prohibition against graven images.⁵² The suit was also brought under New York’s privacy statute.⁵³ The court accepted the defendant’s argument that art is exempt from the privacy statute as protected speech, noting that “[a] profit motive in itself does not necessarily compel a conclusion that art has been used for trade purposes.”⁵⁴

In *Arrington v. New York Times Co.*, a 1982 New York Court of Appeals decision upon which *Nussenzweig* relied, the plaintiff was an African-American man whose picture, but not name, appeared on the cover of the *New York Times Magazine* in connection with an article about the expanding black middle class in America.⁵⁵ The plaintiff disagreed with the views in the article and alleged that he and readers who knew him found it “insulting, degrading, distorting and disparaging,” thus subjecting him to public scorn and ridicule.⁵⁶ Here too the court held in favor of the main defendant, the New York Times Company.⁵⁷ Both *Nussenzweig* and *Arrington* upheld First Amendment protections in the face of “deeply and spiritually offensive” uses, thus demonstrating that speech causing emotional harm to particular individuals cannot be regulated in all contexts.⁵⁸

⁴⁹ *Mason*, 2006 WL 3230279, at *1, *4–*5; see also N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2006).

⁵⁰ *Mason*, 2006 WL 3230279, at *6. *Mason* and *Jews for Jesus* later settled out of court, with *Jews for Jesus* issuing an apology but providing no monetary settlement. Hartocollis, *supra* note 46.

⁵¹ 78 U.S.P.Q.2d 1123, 1126 (N.Y. Sup. Ct. 2006).

⁵² *Id.* at 1127.

⁵³ *Id.* at 1124.

⁵⁴ *Id.* at 1129.

⁵⁵ 434 N.E.2d 1319, 1320 (N.Y. 1982).

⁵⁶ *Id.*

⁵⁷ *Id.* at 1323. The court ruled that the action could properly proceed against several other defendants, however, including the photographer who took the picture and the photographic agency who sold it to the *New York Times Magazine*. *Id.* at 1323–24.

⁵⁸ *Nussenzweig*, 78 U.S.P.Q.2d at 1128–30; accord *Arrington*, 434 N.E.2d at 1321–23.

Nussenzweig and *Arrington* differ from the case involving Jackie Mason in that they involve a less prominent focus on persona. In both *Nussenzweig* and *Arrington*, the references to the plaintiffs' personas were much less direct because the plaintiffs were not celebrities and only their pictures and not their names were used. Moreover, *Nussenzweig* involved an image in an art collection and *Arrington* involved a photograph in a major news publication, while *Mason* concerned a proselytizing religious advertisement. Nevertheless, all three cases involved a conflict between the right of publicity and the First Amendment wherein a dignity harm was the focus. In each case, the court failed to provide an appropriate analytical framework. The following Part illustrates that this failure was the result of the judiciary's formulation of, and reliance upon, tests that are of limited value with respect to situations involving dignity damage.

II. LIMITATIONS OF THE PROPOSED BALANCING TESTS

The only U.S. Supreme Court case to focus on the right of publicity, the 1977 case *Zacchini v. Scripps-Howard Broadcasting Co.*, heavily influenced not only the scope of the doctrine but also its interface with the First Amendment.⁵⁹ *Zacchini* involved an entertainer who performed as a "human cannonball."⁶⁰ A reporter for the defendant broadcasting company used a movie camera to record the plaintiff's performance at a local fair after having been denied permission to record the previous day, and the defendant aired the clip of the entire performance on the evening news.⁶¹ Plaintiff sued for damages pursuant to the Ohio state law right of publicity.⁶² The Supreme Court held that the First and Fourteenth Amendments did not immunize the defendant from paying damages.⁶³

Two things about *Zacchini* are especially noteworthy for purposes of this Article. First, the Court was very careful to situate the right of publicity as a cause of action independent of actions based on affronts to human dignity.⁶⁴ A careful reading of this case underscores that the Court focused on the fact that the television station was interfering with the plaintiff's business opportunities—the case was steeped in eco-

⁵⁹ See 433 U.S. 562, 562 (1977).

⁶⁰ *Id.* at 563.

⁶¹ *Id.* at 563–64.

⁶² *Id.* at 565.

⁶³ *Id.* at 565–66.

⁶⁴ See *id.* at 573, 575–76.

conomic considerations.⁶⁵ No fewer than three times did the Court emphasize that the plaintiff was seeking damages and not injunctive relief.⁶⁶ Second, the Court emphasized that it believed the reputational false light invasion of privacy tort to be completely distinct from the economic right of publicity.⁶⁷ As a result, the Court rejected the actual malice standard for liability applied in earlier cases, such as *Time, Inc. v. Hill*.⁶⁸ Instead, the Court invoked a balancing test to determine the appropriate navigation between the right of publicity and the First Amendment.⁶⁹ The invocation of such an approach has been significant because lower courts have interpreted *Zacchini* as requiring a balancing of the right of publicity against First Amendment considerations.⁷⁰ Moreover, given that *Zacchini* involved the unauthorized appropriation of a performer's entire act, it has been easy to interpret the Court's holding as limited to the narrow set of facts at issue.⁷¹

Courts subsequent to *Zacchini* have invoked a variety of balancing tests for determining how the right of publicity should be applied in cases presenting First Amendment challenges. There are at least five basic approaches: (1) the transformative use test;⁷² (2) the predominant purpose test;⁷³ (3) an actual malice standard;⁷⁴ (4) the relatedness/*Restatement* approach;⁷⁵ and (5) a general ad hoc balancing ap-

⁶⁵ See *Zacchini*, 433 U.S. at 573, 575–76.

⁶⁶ See *id.* at 565, 573–74, 578.

⁶⁷ *Id.* at 571–76.

⁶⁸ *Id.* at 570–75; see also *supra* notes 22–25 and accompanying text.

⁶⁹ See *Zacchini*, 433 U.S. at 574–78 (noting that broadcasting the entire performance would have a “substantial threat to the economic value of that performance,” and suggesting that the television station could have reported on the performance without broadcasting it in its entirety). According to the Court, “[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.” *Id.* at 574–75.

⁷⁰ See, e.g., *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2872 (2008); see also *infra* notes 103–118 and accompanying text. See generally DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (2009) (offering a critique of the modern approach to First Amendment conflicts with intellectual property interests, including the right of publicity).

⁷¹ See 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8:25, at 134 (2d ed. 2008). This interpretation is bolstered by the *Zacchini* Court’s own language in the case. See 433 U.S. at 573 n.10, 576 (noting that the case of appropriation was particularly strong as the defendant used the plaintiff’s entire act).

⁷² See *infra* notes 78–85 and accompanying text.

⁷³ See *infra* notes 86–89 and accompanying text.

⁷⁴ See *infra* notes 90–95 and accompanying text.

⁷⁵ See *infra* notes 96–101 and accompanying text.

proach.⁷⁶ Significantly, there is little uniformity or wide-spread adherence among courts with respect to any of these tests, and the Supreme Court recently declined to provide clarity by denying certiorari in a relevant case.⁷⁷ Regardless, all of these tests are of limited use in right of publicity cases involving dignity harms because they focus on the nature of the defendant's use rather than the actual harm to the plaintiff. The following discussion explores these tests and their limitations in this context.

A. *The Transformative Use Test*

In the 2001 case, *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the defendant-artist sold lithographs and t-shirts bearing the likeness of the Three Stooges reproduced from a charcoal drawing he had made.⁷⁸ The plaintiff, the registered owner of all the rights to the Three Stooges, sued the defendant under the California right of publicity statute, seeking damages and injunctive relief.⁷⁹ Drawing on the first prong of the fair use doctrine in copyright law, the Supreme Court of California developed its "transformative test," which asks whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."⁸⁰ The Supreme Court of California also recognized a subsidiary inquiry that focuses on whether "the marketability and economic value of the challenged work [is] derive[d] primarily from the fame of the celebrity depicted."⁸¹ If the economic value of the challenged speech is derived primarily from some source other than the depicted celebrity's fame, "it may be presumed that sufficient transformative elements are present to warrant First Amendment protection."⁸² Using these criteria,

⁷⁶ See *infra* notes 102–119 and accompanying text.

⁷⁷ See *Major League Baseball Advanced Media v. C.B.C. Distribution & Mktg., Inc.*, 128 S. Ct. 2872 (2008); see also *infra* notes 103–118 and accompanying text.

⁷⁸ 21 P.3d 797, 800–01 (Cal. 2001).

⁷⁹ *Id.* at 799–800.

⁸⁰ *Id.* at 808 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

When artistic expression takes the form of a literal depiction or imitation of celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.

Id.

⁸¹ *Id.* at 810.

⁸² *Id.*

the Supreme Court of California held that the right of publicity outweighed the defendant's First Amendment interests.⁸³

The problem with the "transformative use" test is that it takes the focus off the alleged damage to the plaintiff's dignity and instead places it on the nature and impact of the defendant's actions. Why should the nature of the defendant's transformation matter if the real question is whether the law should tolerate a particular violation of the plaintiff's dignity for the sake of the First Amendment? Moreover, this test is conceptually off the mark because it is derived from a gloss on copyright's fair use doctrine, which is concerned with determining the circumstances under which uncompensated copying should be allowed.⁸⁴ Fair use, like most of copyright law, is concerned with calibrating the optimal economic incentives for maximizing creative output. When a plaintiff is trying to vindicate damage to her dignity, such economic incentive is not the primary consideration.⁸⁵

B. Predominant Use

In the 2003 case, *Doe v. TCI Cablevision*, Tony Twist, a former professional hockey player, sued the creators of the *Sparan* comic book for misappropriation of name and defamation based on one of the characters in the comic having a similar name to Twist.⁸⁶ In crafting its "predominant use" test, the Supreme Court of Missouri held:

If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some "expres-

⁸³ *Id.* at 811. According to the court, there were no transformative or creative contributions by defendant; his lithographs and t-shirts depicted a literal likeness of the Three Stooges. *See id.* Also, the court held that "the marketability and economic value of [defendant's] work derives primarily from the fame of the celebrities depicted." *Id.* Thus, the court did not recognize any free speech protection for the defendant's t-shirts and lithographs. *See id.*

For another application of the "transformative" test, see *Winter v. DC Comics*, 69 P.3d 473, 480 (Cal. 2003) (distinguishing *Comedy III Productions* and holding that defendant's comic books were protected by the First Amendment because they depicted "fanciful, creative characters" rather than literal likenesses of the plaintiffs).

⁸⁴ *See Campbell*, 510 U.S. at 578-79.

⁸⁵ For a critique of the transformative use test, see Volokh, *supra* note 8, at 917-23.

⁸⁶ 110 S.W.3d 363, 365-66 (Mo. 2003). The trial court dismissed the defamation claim early in the litigation, but it allowed the misappropriation of name claim to go to trial. *Id.* at 365. After the jury reached its verdict in favor of the plaintiff on the misappropriation claim, the trial court granted the defendants' motion for judgment notwithstanding the verdict, and the plaintiff appealed. *Id.*

sive” content in it that might qualify as “speech” in other circumstances.⁸⁷

Thus, the focus of the predominant use test is whether a defendant’s speech is primarily commercial or primarily expressive.⁸⁸ As with the transformative use test, the predominant use test is fundamentally inadequate to protect dignity harms. Any test focusing on the defendant’s intent is irrelevant to the impact on the plaintiff’s dignity interest because uses that are commercial, expressive, or in-between can significantly damage a plaintiff’s dignity.⁸⁹

C. The Actual Malice Test

In 2001, in *Hoffman v. Capital Cities/ABC, Inc.*, the U.S. Court of Appeals for the Ninth Circuit adopted an “actual malice” test for determining whether First Amendment or right of publicity concerns should prevail.⁹⁰ In *Hoffman*, defendant-magazine published an article

⁸⁷ *Id.* at 374 (quoting from Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003)). The court determined that if “the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.” *Id.* (internal citation omitted). The court also criticized the transformative test for “giv[ing] too little consideration to the fact that many uses of a person’s name and identity have both expressive and commercial components” and under that test, “the transformation or fictionalized characterization of a person’s celebrity status is not actionable even if its sole purpose is the commercial use of that person’s name and identity.” *Id.*

After articulating its new test, the Supreme Court of Missouri remanded the case for a new trial. *Id.* at 376. On remand, the jury awarded Twist \$15 million in damages, and the Missouri Court of Appeals affirmed. *Doe v. McFarlane*, 207 S.W.3d 52, 56, 76 (Mo. Ct. App. 2006).

⁸⁸ This test has been criticized insofar as “it does not explain how courts should determine the predominant purpose of a contested device that is both highly expressive and obviously commercial.” Recent Case, *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), cert. denied sub nom. *Twist v. McFarlane*, 2004 WL 46675 (U.S. Jan. 12, 2004) (No. 03-615), 117 HARV. L. REV. 1275, 1280 (2004). In addition, the test requires courts to determine legal protection by measuring literary and expressive value, something courts have been reluctant to do. *Id.* at 1281; see, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

⁸⁹ Although the defamation claim was dismissed, the facts of the Tony Twist litigation suggest that a morally based harm might have been lurking in the background. The character, Anthony “Tony Twist” Twistelli, was “a Mafia don whose list of evil deeds includes multiple murders, abduction of children and sex with prostitutes.” *TCI Cablevision*, 110 S.W.3d at 366; see *Welkowitz & Ochoa*, *supra* note 38, at 656–57 (discussing case as an example of “the right of publicity . . . being used as an alternative to defamation”). Nonetheless, the evidence presented on the issue of damages suggests that the plaintiff’s concern was also largely economic in nature. See *TCI Cablevision*, 110 S.W.3d at 367.

⁹⁰ 255 F.3d 1180, 1186 (9th Cir. 2001).

on fashion that contained photographs of actors.⁹¹ One photograph showed Dustin Hoffman in the movie *Tootsie*, but rather than using the original image, the magazine replaced Hoffman's body with the body of a model wearing a dress.⁹² Even though this case shortly followed *Comedy III Productions*, the court did not use the Supreme Court of California's transformative use test or a balancing test. Rather, the Ninth Circuit used the "actual malice standard" applied in defamation cases since *New York Times Co. v. Sullivan*, because it believed defendant's conduct, as noncommercial speech about a public figure, was entitled to full First Amendment protection.⁹³ The Ninth Circuit concluded that Hoffman did not prove actual malice by clear and convincing evidence.⁹⁴

The Ninth Circuit's application of the actual malice test was criticized by the Supreme Court of Missouri in *TCI Cablevision* on the ground that "*Zacchini* stands for the proposition that the actual malice standard does not apply to the tort of appropriation of a right of publicity."⁹⁵ This is correct to the extent that the actual malice test is not the appropriate test to apply in these cases. Here again, the actual malice test focuses on the defendant's intent and this emphasis obscures the true nature of the inquiry which concerns damage to the plaintiff's dignity.

D. *The Relatedness/Restatement Approach*

The *Third Restatement of Unfair Competition* suggests yet another test for determining when the First Amendment should trump the right of publicity. The *Restatement* provides that "if the name or likeness is used

⁹¹ *Id.* at 1183.

⁹² *Id.*

⁹³ *See id.* at 1186. Thus, the court inquired whether the defendant "acted 'with reckless disregard for the truth' or a 'high degree of awareness of probable falsity.'" *Id.* (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989)); *cf.* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 75 n.27 (2007) (arguing that false commercial speech should "be treated fungibly with false non-commercial speech," thus triggering an "actual malice" standard of protection).

⁹⁴ *Hoffman*, 255 F.3d at 1189. In so holding, the Ninth Circuit reversed the district court. *Id.*

⁹⁵ *TCI Cablevision*, 110 S.W.3d at 373 (internal quotations omitted) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988)); *see Zacchini*, 433 U.S. at 574 (noting that *New York Times Co.* and its progeny "emphasize the protection extended to the press by the First Amendment in defamation cases, particularly when suit is brought by a public official or a public figure. None of them involve an alleged appropriation by the press of a right of publicity existing under state law.").

solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising."⁹⁶ Therefore, this "relatedness" test "protects the use of another person's name or identity in a work that is 'related to' that person."⁹⁷ If the work is not related to the identified person, the right of publicity interests will outweigh the First Amendment interests in using the persona.⁹⁸ Moreover, a privilege to use another's identity under the *Restatement* may be lost if the work contains substantial falsehoods.⁹⁹

In discussing the *Restatement's* approach, the U.S. Court of Appeals for the Sixth Circuit has observed that the *Restatement* invokes a "rule analogous to the rule of fair use in copyright law."¹⁰⁰ In its 2003 decision, *ETW Corp. v. Jireh Publishing, Inc.*, the court specifically noted that the *Restatement* calls for an analysis of the "substantiality and market effect of the use of the celebrity's image . . . in light of the informational and creative content of the defendant's use."¹⁰¹ By emphasizing the nature of the defendant's use rather than the existence of dignity damage to the plaintiff by virtue of the defendant's use, the *Restatement's* approach also fails to provide an appropriate means of considering what is truly at stake in publicity cases involving dignity damage.

E. *Ad Hoc Balancing*

Several cases have employed an ad hoc balancing approach to resolve right of publicity and First Amendment conflicts.¹⁰² One example

⁹⁶ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

⁹⁷ *TCI Cablevision*, 110 S.W.3d at 373. The list of "related uses" includes:

[T]he use of a person's name or likeness in news reporting . . . use in entertainment and other creative works, including both fiction and nonfiction . . . [use] as part of an article published in a fan magazine or in a feature story broadcast on an entertainment program . . . dissemination of an unauthorized print or broadcast biography . . . [and] [u]se of another's identity in a novel, play or motion picture . . .

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

⁹⁸ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

⁹⁹ See *id.*

¹⁰⁰ *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 937 (6th Cir. 2003); see RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. d (1995).

¹⁰¹ *ETW*, 332 F.3d at 937; see RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. d (1995).

¹⁰² Professor McCarthy describes the ad hoc balancing approach as "no more than a case-by-case weighing of competing values and interests to determine whether 'speech' in a particular case is deserving of constitutional immunity from legal liability." 2 MCCARTHY, *supra* note 71, § 8:23, at 131. He is highly critical of such an approach. See *id.* ("[Ad hoc balancing] seemingly amounts to no more than an 'I know it when I see it' approach. . .

is *ETW*, where the court held that a sports artist's print incorporating Tiger Woods' victory at the 1997 Masters Tournament was entitled to First Amendment protection.¹⁰³ In so holding, the court invoked an analytical framework combining elements of the "actual malice" standard used in *Hoffman*, the "transformative" test from *Comedy III Productions*, and the Restatement's formulation.¹⁰⁴ In addition, a prominent component of the court's focus was the 1996 U.S. Court of Appeals for the Tenth Circuit decision, *Cardtoons, L.C. v. Major League Baseball Players Association*.¹⁰⁵ In *Cardtoons*, the court held that Cardtoons' First Amendment rights to produce parody baseball trading cards outweighed the players' right of publicity.¹⁰⁶ The court in *Cardtoons* used an ad hoc balancing test after it acknowledged that the trading cards in fact infringed on the association's publicity rights.¹⁰⁷

Most recently, the U.S. Court of Appeals for the Eighth Circuit invoked an ad hoc balancing test in its 2007 decision, *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*¹⁰⁸ C.B.C. Distribution and Marketing, Inc. ("CBC"), a producer of fantasy baseball games, sought a declaratory judgment that it had a First Amendment right to make an unlicensed use of the names and statistics of major league players in its games.¹⁰⁹ A competing company that had been granted the license to use such information filed a counterclaim, arguing that CBC violated the right of publicity belonging to the major league baseball players and their association.¹¹⁰ The court held that although the players provided sufficient evidence to establish a right of publicity claim under state law, CBC's First Amendment rights superseded the players' right of publicity.¹¹¹

Although the courts in both *Cardtoons* and *C.B.C. Distribution* discussed the relevance of non-economic harms, neither court focused specifically on how damage to a publicity plaintiff's dignity interest

[T]here is no rule to be applied, there is only the unrestrained and unpredictable judicial balancing of competing values.").

¹⁰³ 332 F.3d at 918–919, 925, 938.

¹⁰⁴ See *id.* at 930–31, 933–38.

¹⁰⁵ See *id.* at 932–33, 936–38.

¹⁰⁶ 95 F.3d 959, 976 (10th Cir. 1996).

¹⁰⁷ *Id.* at 968, 970–76.

¹⁰⁸ 505 F.3d at 823.

¹⁰⁹ *Id.* at 820.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 824. Several key facts were critical to the court's holding: the information used by CBC was already in the public domain; courts have "recognized the public value of information about the game of baseball and its players;" and the economic interests of the players were not implicated, as the players were already highly compensated. *Id.* at 823–24.

should be considered in the overall balancing analysis. For example, in *Cardtoons*, the court dismissed the prevention of emotional injuries as a justification for the right of publicity.¹¹² According to the court, the right of publicity is intended “to protect against the loss of financial gain, not mental anguish.”¹¹³ As discussed earlier, this simplistic view does not represent a complete understanding of the right of publicity because it ignores the inherent dignity interest at stake in many publicity cases. The court bolstered its view by saying that the non-economic justifications for the right of publicity “further break down in the context of parody, where the right to profit from one’s persona is reduced to the power to suppress criticism.”¹¹⁴ Had the court performed a more nuanced analysis, it might have grappled with the question of whether cases involving parody should include a different set of considerations with respect to a plaintiff’s dignity interest than other right of publicity cases. As the opinion stands, however, the court missed the opportunity to articulate a viable framework for evaluating the relevance of alleged dignity damage in this and future cases.

The court in *C.B.C. Distribution*, which followed and relied upon the approach in *Cardtoons*,¹¹⁵ performed a similarly unhelpful analysis, which perhaps can be excused somewhat more readily since this case did not involve a visible assault to the dignity of the major league players given that the case involved the unlicensed use of the players’ names and game statistics.¹¹⁶ Still, the court’s observation that “some courts have indicated that the right of publicity is intended to promote only economic interests and that noneconomic interests are more directly served by so-called rights of privacy,”¹¹⁷ not only fails to illuminate the relevant issues, but also misleads future courts where a dignity interest may indeed be at stake.

By denying the petition for certiorari in *C.B.C. Distribution*, the Supreme Court missed an opportunity to address the apparent split among the courts regarding the appropriate test for resolving conflicts between the right of publicity and the First Amendment.¹¹⁸ The current

¹¹² See 95 F.3d at 976.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *CBC Distribution*, 505 F.3d at 823–24.

¹¹⁶ *Id.* at 820.

¹¹⁷ *Id.* at 824.

¹¹⁸ See *Major League Baseball Advanced Media*, 128 S. Ct. at 2872 (denying certiorari).

lack of consensus in this area¹¹⁹ is disturbing because it creates a practical uncertainty for future litigants, as well as analytical chaos. Moreover, when a right of publicity claim involves potential damage to human dignity, the First Amendment analysis is particularly complex. As discussed in this Part, to date courts have not developed an appropriately nuanced analysis to address this issue. All of the tests applied by the courts are focused on the defendant's relationship to the work or on the defendant's intent in using the plaintiff's persona rather than on the nature and impact of the dignity damage allegedly suffered by the plaintiff. Therefore, these tests do not afford adequate guidance in right of publicity cases in which the plaintiff is concerned with dignity damage to the integrity of her persona. Part III proposes a more suitable framework for addressing this issue.

III. A FRAMEWORK FOR CONSIDERING THE HUMAN DIGNITY COMPONENT IN FIRST AMENDMENT CHALLENGES TO THE RIGHT OF PUBLICITY

Leading First Amendment scholars manifest an appreciation for the dual nature of free speech interests. In writing about the First Amendment, these theorists reveal a concern with the same dignity and autonomy interests at stake in right of publicity litigation. For example, Edwin Baker has proposed a "liberty" model for First Amendment protection according to which speech is protected "because of the value of speech conduct to the individual."¹²⁰ He sees "individual self-fulfillment and participation in change as the key First Amendment values."¹²¹ Martin Redish has developed a somewhat similar theory according to which he maintains that the only true value served by the First Amendment is "individual self-realization."¹²² He understands the self-realization concept as including an instrumental value that safeguards "the development of the individual's powers and abilities" in order to realize her full potential, as well as an intrinsic value that guarantees individual control over one's destiny.¹²³ Both of these First Amendment theories emphasize the importance of an individual's autonomy, which

¹¹⁹ Professor McCarthy summarizes the current state of the law by noting that "[c]lear answers to these questions have continued to elude both the Supreme Court and constitutional scholars for many years." 2 MCCARTHY, *supra* note 71, § 8:23, at 130–31.

¹²⁰ C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966, 990 (1978); *see also* KWALL, *supra* note 44.

¹²¹ *Id.* at 991.

¹²² Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

¹²³ *Id.*

is indeed an important interest protected by the right of publicity. As Baker asserts, “people’s choices, their definition and development of *themselves*, must be respected—otherwise they become mere objects for manipulation or means for realizing someone else’s ideals or desires.”¹²⁴

Although these two theories differ from one another in important ways,¹²⁵ with respect to the right of publicity, the application of both theories results in the anomaly that the liberty or self-realization of the persona may impinge on the liberty or self-realization of those who seek to use the persona’s expression. The key to the successful application of these free speech theories to the right of publicity lies in the recognition that balancing of rights is essential.¹²⁶

The question, then, in cases involving publicity rights and the First Amendment, is how should courts evaluate the existence and nature of the damage to a persona’s dignity interest? I suggest that courts should carefully consider the following two factors. First, to what extent does the defendant’s use force the plaintiff to say something she does not want to say? Second, to what extent does the defendant’s use of the plaintiff’s persona result in the public perceiving a linkage between the plaintiff and the defendant’s use?

In a conflict between the right of publicity and the First Amendment, courts should initially examine whether the defendant’s use results in a type of compelled or forced speech with respect to the publicity plaintiff. Consideration must be given to whether a given use of a persona’s expression is considered coercive because “to the extent that speech is involuntary . . . [it] does not involve the *self*realization or *self*fulfillment of the speaker.”¹²⁷ In developing his theory of free speech, Baker recognizes that “respect for the integrity and autonomy of the individual usually requires giving each person at least veto power over the use of . . . her own speech.”¹²⁸ Therefore, speech is subject to control when it is “designed to disrespect and distort the integrity of another’s mental processes.”¹²⁹ Moreover, freedom of expression protects

¹²⁴ Baker, *supra* note 120, at 992.

¹²⁵ Redish takes issue with Baker’s theory on the ground that it is too narrowly confined, and therefore results in the exclusion of expression that should otherwise be protected. See Redish, *supra* note 122, at 620–22.

¹²⁶ See *id.* at 624.

¹²⁷ Baker, *supra* note 120, at 996.

¹²⁸ *Id.* at 1000.

¹²⁹ See *id.* at 1002.

against distortion of expression.¹³⁰ The theory supporting the invocation of this factor would also seem to require that the individual's objection to the use of her identity be reasonably credible.

An example of such compelled speech that is reasonably objectionable to the persona arguably can be seen in the situation involving Jackie Mason's action against the Jews for Jesus.¹³¹ The facts of this case suggest a highly coercive, prominent use of Mason's persona, especially with respect to the cover of the defendant's pamphlet, which featured a caricature of Mason accompanied by the legend: "Jackie Mason . . . A Jew for Jesus!"¹³² In its brief, the defendant argued that "[t]he combination of exclamation point and question mark signals the incredulous tone of the question."¹³³ I would submit, however, that the defendant's pamphlet, particularly the cover, involved a use of Mason's persona to depict him saying something he does not believe. The "incredulous tone" of the legend also is not as clear-cut as the defendant suggests. A situation such as this triggers a dignity harm that is far more serious than one that simply involves an unflattering depiction because it targets the very essence of an individual's autonomy interest. Despite the wide scope of protection the First Amendment offers religious materials, the possibility that the defendant's pamphlet constituted compelled speech would have been a fruitful avenue for the court to explore in this scenario.

My second proposal is that courts should consider the extent to which a defendant's unauthorized appropriation of a plaintiff's persona results in the public perceiving a linkage between the plaintiff and the defendant's use. This consideration is grounded in the idea that in order for there to be a true assault on a person's dignity, the defendant's use must be such that it compromises the public's ability to understand that such use is "an original and separate expression, attributable to" an entity distinct from the persona.¹³⁴ The right of publicity safeguards individuals' abilities to control the public presentation of their personas in

¹³⁰ Cf. Leslie Kim Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Expression*, in 2 NEW DIRECTIONS IN COPYRIGHT 150 (Fiona Macmillan ed., 2006) (observing that freedom of expression supports the right of integrity's "protection against distortion of expression").

¹³¹ See *Mason v. Jews for Jesus*, No. 06 Civ. 6433(RMB), 2006 WL 3230279, at *1 (S.D.N.Y. Nov. 8, 2006); see also *supra* notes 44–50 and accompanying text.

¹³² See Defendant Jews for Jesus' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 3–4, *Mason*, 2006 WL 3230279.

¹³³ *Id.* at 20.

¹³⁴ *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (discussing fair use doctrine in copyright infringement case).

commercial contexts. Therefore, the requirement that actionable conduct requires a linkage by the public between the persona and the unauthorized use is consistent with the human dignity interest underlying the right of publicity. Dignity as a construct is embodied in externalities that command respect and attention.¹³⁵ Thus, dignity recognition demands an external embodiment—the persona “constructed” by all individuals—which allows the inner personality to commodify and explain itself to the outside world. This externalized persona can be analogized to a conventional work of authorship in that the effort involved in the persona’s construction represents an intellectual, emotional, and physical effort on the part of the persona similar to that engaged in by any author. When that external construction is compromised by an unauthorized use that the public understands as emanating in some way from the persona, the dignity of the individual is damaged. On the other hand, the dignity violation is diminished absent a setting in which the public links the persona and the unauthorized use.¹³⁶

Appropriate regard for these two considerations working in tandem can greatly inform the analysis in cases of conflict between the right of publicity and the First Amendment. Specifically, the defendant’s First Amendment interest is substantially diminished in situations in which the plaintiff is being forced to say something she does not believe and the public is likely to think that the defendant’s use is indeed linked to the plaintiff. Conversely, these factors can help to identify easy cases where the First Amendment should prevail. For example, where it is obvious that the defendant’s work is fiction, the First Amendment generally should outweigh whatever dignity harms a plaintiff may claim. Such instances typically do not involve either coerced

¹³⁵ Theologian Rabbi Joseph Soloveitchik remarked in his classic work, *The Lonely Man of Faith*: “There is no dignity in anonymity. If one succeeds in putting his message . . . across he may lay claim to dignity.” Moreover, “[t]he silent person, whose message remains hidden and suppressed in the in-depth personality, cannot be considered dignified.” JOSEPH B. SOLOVEITCHIK, *THE LONELY MAN OF FAITH* 26 (1965). In a similar vein, Bloustein linked his description of the inviolate personality to the subject of authors’ rights by observing: “It is because our Western ethico-religious tradition posits such dignity and independence of will in the individual that the common law secures to a man ‘literary and artistic property’ —the right to determine ‘to what extent his thoughts, sentiments, emotions shall be communicated to others.’” Bloustein, *supra* note 13, at 971 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890)).

¹³⁶ *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (declining to hold that “a State’s interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved”).

speech or a risk of the public linking the defendant's work with that of the plaintiff's identity. With respect to pure fictionalizations clearly marketed as such, there is virtually no chance of deceiving the public or tarnishing the persona's reputation. Thus, the basis for an alleged assault to an individual's dignity is reduced in these circumstances. An argument also can be made that fictionalized works derive their appeal more from the independent contribution of the work's creator, as opposed to that of the persona. Moreover, there would be a tremendous chilling of incentives if writers were forced to compensate someone every time they created a character who resembled or was based upon a real individual.¹³⁷

Parodies create their own unique set of circumstances in connection with personas, just as they do with respect to conventional copyrighted texts. Recall that in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, the court held in favor of Cardtoons, emphasizing that parody merits complete protection under the First Amendment.¹³⁸ In balancing the players' property rights against Cardtoons' free speech rights, the court pointed out that parody typically does not entail a high likelihood of confusion over who is speaking, and that parody also presents a particularly compelling form of self-expression.¹³⁹ Moreover, the court noted that "[p]arodies of celebrities are an especially valuable means of expression because of the role celebrities play in modern society."¹⁴⁰ Of course, parodies often involve unflattering uses of personas. In *Cardtoons*, the director of licensing for the Major League Baseball Players Association testified that his organization "would never license a parody which poked fun at the players."¹⁴¹ Similarly, Carol Burnett would not have authorized the television show *Family Guy* to depict her character Charwoman mopping the floor in a porn shop.¹⁴² Nevertheless, it is precisely because the public typically understands that such parodies are not authorized that the public is not deceived as to the use of the per-

¹³⁷ Cf. *Ruffin-Steinback v. dePasse*, 267 F.3d 457, 462 (6th Cir. 2001) (noting that the right of publicity does not extend to "fictionalized likenesses in a work protected by the First Amendment and the advertising incidental to such uses").

¹³⁸ 95 F.3d 959, 969, 976 (10th Cir. 1996).

¹³⁹ *Id.* at 970, 972.

¹⁴⁰ *Id.* at 972. The court continued that "a parody of a celebrity does not merely lampoon the celebrity, but exposes the weakness of the idea or value that the celebrity symbolizes in society." *Id.*

¹⁴¹ *Id.*

¹⁴² See *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 966, 971-72 (C.D. Cal. 2007) (granting the defendant's motion to dismiss the plaintiff's copyright claim on the grounds that the parody constitutes fair use).

sona in the parody.¹⁴³ Thus, most parodies lack the necessary linkage by the public between the parody and the persona to cause a dignity harm.¹⁴⁴

In a similar vein, Eugene Volokh posits that a t-shirt featuring a picture of O.J. Simpson golfing with the text “Still looking for the real killer” would be “transformative” under the *Comedy III* test.¹⁴⁵ According to the framework I propose, however, the reason the defendant should prevail in this example is not because of the transformative nature of the defendant’s use, but rather because this hypothetical does not involve either coerced speech or the element of public linkage of the defendant’s work to the publicity plaintiff.

Another example is furnished by the right of publicity action filed by Arnold Schwarzenegger concerning the manufacture and sale of a bobblehead doll in the Governor’s likeness wearing a business suit and carrying an assault rifle with a bandolier around its shoulder.¹⁴⁶ According to David Welkowitz and Tyler Ochoa, the settlement illustrated that this was really a case of “stealth” defamation because it permitted the defendants to continue the manufacture and sale of the doll, absent the assault rifle and bandolier.¹⁴⁷ Had this case gone to trial and resulted in a judicial opinion, a likely focus of the discussion would have been whether the defendants’ activity constituted merchandising or political speech. In my view, the alleged dignity interest identified by Welkowitz and Ochoa could be disposed of at the outset by applying

¹⁴³ In the *Burnett* case, the court also granted the defendant’s motion to dismiss the plaintiff’s Lanham Act claim because the nature of the use “does not explicitly mislead the viewer as to affiliation, connection, association with, or sponsorship or approval by plaintiffs.” *Id.* at 973. *But see* Joseph H. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to Be Understood as Fact*, 2008 UTAH L. REV. 875, 878, 918 (critiquing the judiciary’s monolithic approach that assumes that if an article overall is a parody, there is no need for determining “whether some of the events depicted could reasonably be interpreted as having actually occurred”).

¹⁴⁴ In *Mason*, the defendant claimed its use was a parody. *See* 2006 WL 3230279, at *1; *see also supra* notes 44–50 and accompanying text. A review of the case, however, suggests that a reasonable reader could very well draw the conclusion that Mason was somehow associated with the defendant, particularly given the use of his image on the cover with a suggestive legend that is open for different interpretations. *See Mason*, 2006 WL 3230279, at *1; *see also* Defendant Jews for Jesus’ Memorandum, *supra* note 132, at 3–6.

¹⁴⁵ Volokh, *supra* note 8, at 920–21.

¹⁴⁶ *See* Welkowitz & Ochoa, *supra* note 38, at 654.

¹⁴⁷ *Id.* at 653–54 (noting “the settlement demonstrates that what Schwarzenegger objected to was not really the use of his image; it was the use of his image *in a particular way*”). Welkowitz and Ochoa assert that “a legal standard that effectively allows a political figure to censor non-defamatory political speech is hardly an appropriate role for the First Amendment.” *Id.* at 673.

the two proposed factors. Some may see this situation as involving an element of “coerced speech,” although given the overall context of the case, its presence is questionable. Nonetheless, the linkage factor clearly is absent as people would hardly assume that Schwarzenegger was behind the defendants’ product. Overall, then, this situation is similar to that involving fictionalizations or parody.

In contrast, a more difficult call is presented by an issue that surfaced during the 2008 presidential election when John Mellencamp and the Swedish group Abba publicly objected to presidential candidate Senator John McCain using their respective hit songs, “Our Country” and “Take a Chance on Me” as theme songs.¹⁴⁸ To what extent should an individual be able to bar the use by a political candidate of a song recorded by, and publicly associated with, her persona? Depending on the circumstances, this type of situation can involve an element of coerced speech by the candidate with respect to the persona. The “linkage” issue also is present as it is conceivable that people would assume endorsement on the part of the persona in these circumstances. Although the actual outcome presumably would be very fact dependent, the factors proposed in this Article have the potential for informing the analysis in this type of situation.

CONCLUSION

Although space constraints prevent me from addressing the important issue of appropriate remedies where dignity harms are found in connection with publicity actions, this area also deserves scholarly attention. In thinking about this aspect of the First Amendment and right of publicity conflict, it strikes me that there is much potential for mitigating the presence of compelled speech and public linkage through the creative use of disclaimer remedies.¹⁴⁹ The remedial issue, however, flows logically from the question of liability which has been the focus of this Article. My goal has been to spur more critical thinking about the legal framework that should govern conflicts between the First Amendment and the right of publicity in situations involving an alleged dignity harm to the persona. In sum, I believe the law in this

¹⁴⁸ See Carey Lening, *Got Clearance? Why Failing to Clear a Song with the Artist May Spell More Than Just Political Embarrassment for Candidates*, 75 PAT. TRADEMARK & COPYRIGHT J. (BNA) 575 (Mar. 28, 2008); see also Sarah Wheaton, *Theme Songs and Others*, N.Y. TIMES, Feb. 16, 2008, at A14 (providing other examples of presidential candidates who had to stop using certain songs in their campaigns).

¹⁴⁹ I explore in detail the topic of disclaimers as a remedial device in the context of moral rights actions in KWALL, *supra* note 44.

area would be clarified substantially by imposing explicit criteria for determining a defendant's liability where a persona's objection is to the nature—rather than to the existence—of the defendant's use.

